90-432

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAMES N. PERRY,

Petitioner,

vs.

PRUDENTIAL-BACHE SECURITIES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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September 10, 1990

QUESTIONS PRESENTED FOR REVIEW

In an action brought under The Age Discrimination In Employment Act, is it proper to require a higher standard of proof of discrimination of the better paid, more senior employee than that required of the clerical worker and does the Trial Court's suggestion that there is a double standard (and the Third Circuit Court of Appeals sanctioning of it) so depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

The United States Court of Appeals for the Third Circuit issued two decisions, within five months of each other, which are dramatically opposite. The first, *Siegel v. Alpha Wire Corporation*, 894 F.2d 50, *cert. denied*, ____U.S.____, 110 L.Ed2 269 (1990), sets forth the accepted law throughout the federal system involving the standards of proving age discrimination, including that inferences available to the employee generally dictate that the employer's subjective intent and its alleged pretext for termination are questions of fact. In its later decision, however, the one for which review is sought here, the Third Circuit on evidence and facts identical to *Siegel* and arising from the same Trial Court, adopted the Trial Court's conclusion that intent and pretext can be decided by the Court alone on a motion for summary judgment. The disparity between the two decisions, arising as they do out of similar fact patterns, can only be explained by the Court's creation of an impermissible difference between the standards of proof of age discrimination that is required of a well paid employee (but not a member of senior management) and that required of a clerical or outside worker.

STATEMENT PURSUANT TO SUPREME COURT RULE 29.1

The Prudential Insurance Company of America, parent company of Prudential Bache Securities, Inc.

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No.

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JAMES N. PERRY,

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VS.

PRUDENTIAL-BACHE SECURITIES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

James N. Perry, Petitioner, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 904 F.2d 696. The opinion of the United States District Court is reported at 738 F. Supp. 843. Each of said opinions is reprinted in the Appendix hereto.

BASIS OF JURISDICTION

This Court has jurisdiction over this proceeding under 28 U.S.C. §1254(1). The judgment of the Court of Appeals for the Third Circuit sought to be reviewed was entered on May 2, 1990. Rehearing was denied on June 13. This petition for a writ of certiorari is timely filed within the prescribed ninety day period.

STATUTORY PROVISIONS INVOLVED

The Federal Age Discrimination in Employment Act, 29 U.S.C. §621 provides:

> (a) The Congress hereby finds and declares that
>
> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
>
> (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
>
> (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among other workers; their numbers are great and growing; and their employment problems grave;
>
> (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

> (b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

§623 states in relevant part:

> It shall be unlawful for an employer:
>
> (1) to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

STATEMENT OF THE CASE

Petitioner, James Perry began employment with Respondent Pru-Bache Securities [Pru-Bache's] predecessor firm in 1956. He remained there for the next thirty years until abruptly terminated in October, 1986. At the time of his discharge, Petitioner was a senior vice president of the Municipal Bond Department of Pru-Bache, a senior position within the firm, but one conceded by all, not to constitute senior management.

In a complaint filed pursuant to The Age Discrimination in Employment Act, 29 §U.S.C. §621 *et seq*, Perry contended that his age had been a determining factor in his termination, pointing to a number of pieces of evidence that would suggest that this had been Pru-Bache's motivation. The lower court, however, concluded that none of this evidence raised even a single triable issue of fact as to possible discrimination. Instead, the Court concluded that Petitioner had not been qualified for his job or, if he had been qualified, that Pru-Bache had ample non-discriminatory reasons to fire him. The Third Circuit Court of Appeals affirmed on the basis of the decision below.

The evidence of discrimination proffered by Petitioner included (a) age related remarks made to and about him by his superiors, such as, "how old did you say this guy was" and "when did he say he is going to retire?"; (b) statements made to another employee by the very superior later involved in Petitioner's termination that referred to Petitioner as a "senile old bastard", a "stupid old bastard" and being "burned out"; (c) a reference in a termination memorandum to Petitioner's birthdate and "age at next birthday", the reasons for which reference remain in dispute; (d) the fact that, like Petitioner, six other senior members of the municipal division (with an average age in the mid-fifties) were terminated during the same general period and replaced by men significantly younger (with an average age in the mid-thirties); (e) that Petitioner himself who was 56 at the time of termination was replaced by a 41 year old man; (f) that Petitioner's personnel file was replete with laudatory comments about him without a single negative one; (g) that Respondent consistently gave Petitioner, up to the moment of his discharge, significant bonuses for work performed and the highest performance ratings available; (h) that no reason was given initially to Petitioner for his discharge other than the need for "new blood", a company position confirmed in a contemporaneous exchange of correspondence between Petitioner and Respondent's chief executive officer; (i) that the employer's different reasons for Petitioner's termination, alleged incompetence and personality conflicts, only surfaced many months after discharge, after Petitioner had alleged his age discrimination claim, and, even then, the reasons advanced by the employer were inconsistent and implausible; and, lastly, (j) that during his years of stewardship, Petitioner's department yielded the greatest revenues and profits on record for the firm.

In defense, Pru-Bache claimed – belatedly – that Petitioner was not competent at his job, that he failed to provide leadership and that he was a poor administrator, all of which is and was vigorously disputed by Petitioner.

In its decision granting the employer summary judgment, reported at 738 F. Supp. 843 and set forth in the Appendix

hereto, the Trial Court disregarded all this direct evidence, deciding instead that the Petitioner could not make a *prima facie* case that he had performed all aspects of his job, including supervisory roles in a manner satisfactory to his employer (*id.* at 852) and that, even if Petitioner could make out a *prima facie* case, he could not demonstrate that the employer did not, as a pretext for the termination, have a valid business reason for letting him go. (*Id.* at 853) In other words, Petitioner was required on papers alone to "disprove the negative" – i.e., to disprove today what the employer claims were its real subjective reasons years ago for the termination.

Apparently, a key part of the Trial Court's thinking arose from an impermissible difference adopted by it *sua sponte* as to the standard of proof required of a well paid (but not a member of senior management) employee, like Petitioner, and clerical or outside workers, *i.e.*, that higher paid employees for some inexplicable reason have a greater burden of proof to demonstrate intent of age discrimination than do lower paid employees. Indeed, in oral argument the Trial Court annunciated exactly that proposition:

> I think should not people who are superiors to people in that high level position be accorded somewhat more discretion perhaps in their decisions as to employees.
>
> That doesn't mean they can discriminate on the ground of age, but perhaps they're [sic] legitimate reasons for firing someone, don't have to meet, perhaps, such a high burden as someone who's typing 50 words a minute."

Such a bias against the higher paid or educated employee clearly is improper and without any basis in ADEA or the decisional law of the Third Circuit or elsewhere. The laws of our nation do not permit such discretion – at least without some judicial or Congressional basis – to apply different requirements on the professional class, simply because they have more prestigious sounding titles.

REASONS FOR GRANTING THE WRIT

The Third Circuit's decision here runs contrary to several lines of cases throughout the Federal system which indicate the types of direct and indirect proof which are acceptable in discrimination cases. In fact, the instant decision is contrary to the Third Circuit's own pronouncements in another age discrimination action. Indeed, a comparison between the instant decision and the other one best demonstrates how there seems to be two different burdens of proofs in age discrimination cases within the Third Circuit, depending, it seems, on the sophistication of the employee.

As stated, five months before its decision here, the Third Circuit decided another case, *Siegel v. Alpha Wire Corporation*, 894 F.2d 50, 110 L.Ed2 269, which arose from the same Trial Court, had facts, evidence and legal arguments strikingly similar to the instant action, but which resulted in a directly contrary opinion. The single major difference between the two fact patterns was that, in *Siegel*, the employee was from the clerical staff and, in the instant case, that Petitioner was a senior professional who had risen relatively high into the ranks of the firm.

In *Siegel*, a sixty-three year old plaintiff alleged that she had been discharged from her position as purchasing agent and replaced by a twenty-nine year old because of illegal age considerations. She had been told at the time that she was being discharged because her job was being "upgraded". At the time she was fired, plaintiff, like Petitioner here, had in fact received previously good evaluations and was considered by her supervisor to be better than average. (*Id.* at 51)

Supposedly, the president of the employer had also remarked "that old dogs won't hunt" in describing two other employees of the same company. This type of thinking, it was argued by the employee, indicated the presence of a non-permissible age bias in the mind of employer's chief officer of defendant (*id.* at 52). After the lawsuit had been filed, the president of the employer explained that he had terminated the employee

because of declining profits, that he had lost confidence in her loyalty and ability, and that age was not the motivation behind the statement made about the other employees, that "old dogs won't hunt." (*Id.*)

In addition to the direct and discriminatory reference to age in "old dogs won't hunt," the employee, as part of her case of age discrimination, also argued that the discharge of eight other employees within the protected age group indicated the existence of an illegal age bias. Moreover, she alleged that one of the reasons alleged by the employer for her termination – the declining profits of the company – was also suspect as being confected after the fact.

The Trial Court granted the employer summary judgment against plaintiff's age discrimination claim, holding, as here, that the employer had proffered acceptable legitimate business reasons for plaintiff's discharge and that the employer subjectively believed those reasons to be true.

In unanimously reversing the Trial Court, the Third Circuit correctly determined at the outset that the issue it must resolve on appeal was whether the employee "produced enough evidence to support an inference that the reasons articulated [by the employer] for her discharge are pretextual." (*Id.* at 55)

The Court concluded:

> [W]e believe that the grant of summary judgment was erroneous. If a jury were to credit Siegel's evidence that [the employer] more than once used the phrase 'old dogs won't hunt', this, along with the fact that she had received good evaluations from [a superior] and that [the employer] articulated the reasons now alleged to be his motivation for firing [plaintiff] only after she filed suit, could support a verdict in her favor. This is all that need be determined for [plaintiff] to withstand the defendant's motion for summary judgment.

(*Id.*)

The Court of Appeals in *Siegel* went on to explain where the Trial Court had gone wrong in its analysis:

> Rather than examining the evidence and determining whether or not it could reasonably support a jury finding of pretext, however, the district court drew a number of inferences from the evidence, resolving for herself issues which should properly have been left to a jury to decide. As did the district court in *Chipollini*, the trial court here erred in weighing competing inferences and in resolving disputed facts. (citations omitted)

(*Id.*)

If one compares each of the types of evidence which, in *Siegel*, the Third Circuit found created inferences in favor of the employee that had to go to the jury, with the same type of evidence, submitted in the instant case but rejected by the Third Circuit, one quickly realizes that the employee in *Siegel*, the clerical employee, was given the benefit of the doubt as to the real reason for her termination. In *Siegel*, it was to be left to the jury, after it heard each side's story, to judge the credibility of the employer's explanation. In the instant case, however, it was the employer which received the benefit of the doubt. The only conceivable reason for the disparity is that a different, and more onerous, standard of proof was required in the case involving a professional, than was required of a clerical worker in *Siegel*. Certainly, there is no basis for such a distinction for denying Petitioner his day in court in this Court's seminal decision of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

A comparison between the holdings of each case make that obvious. For example, in both *Siegel* and the instant case, there were alleged to have been direct age discriminatory remarks made by the employer to or about its employees. In *Siegel*, the phrase "old dogs won't hunt" was made about other employees, not plaintiff. In the instant case, the remarks of the "senile old bastard" genre were made to a third party witness directly about plaintiff. Hence, they are even more probative as to the employer's intent and motivations, especially when coupled with

the other deprecating age related remarks such as "How old did you say this guy was?" "When did he say he was going to retire", which had been made directly to plaintiff by other officers of defendant. Of course, questions of intent and motive are ones for the jury. *See United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 71617 (1983). The employer's statement *in verba* as to the reason for termination should be heard by the trier of fact. This is true, both under *Siegel* and the law of the other circuits. *See, e.g., Coston v. Plitt Theaters, Inc.*, 831 F.2d 1321 (7th Cir.) *cert. denied*, 485 U.S. 1007, *cert. granted and vacated*, ____U.S.____ 108 S.Ct. 1990, 100 L.Ed2d 223 (1987); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544 (10th Cir. 1988); *Ramsey v. Chrysler First, Inc.*, 861 F.2d 1541 (11th Cir. 1988); *Lindsey v. American Cast Iron Pipe Co.*, 772 F.2d 799 (11th Cir. 1985).

Also, in *Siegel*, the Third Circuit held that the employer's changing explanations as to why plaintiff had been discharged could lead to an inference, which when taken with others, could serve as the basis for a jury's determination that age was a determining factor in plaintiff's discharge. In the instant case, the employer's silence in the face of plaintiff's statement that he had been assured that his performance was not the reason for his discharge, the varied inconsistent reasons belatedly put forth for plaintiff's discharge, a mysterious cache of handwritten memoranda discovered late in the case, the conflict between plaintiff's excellent evaluations, his promotion and his record of bonuses and the employer's tardy explanation that his work performance was inadequate, separately and collectively give rise to at least a similar, if not greater, inference as that recognized in *Siegel* – i.e., that someone at the employer was making up a reason for plaintiff's firing and covering up the real one. Why was Petitioner not entitled to the same set of inferences here? Inconsistencies in performance evaluations prior and subsequent to an employee's termination can support an inference of an improper pretext. Moreover, whether the pretexts for firing existed at the time of the firing or whether they were made up or elaborated upon as the litigation progressed is also a matter for jury consideration. This is the rule in the Third Circuit under *Siegel* as well as earlier precedents. *See Duffy v. Wheeling*

Pittsburgh Steel Corp., 738 F.2d 1393 (3rd Cir.) *cert. denied* 469 U.S. 1087 (1989). It is also the established law under the other Circuits. *See e.g.*, *Krodel v. Young*, 748 F.2d 701, *cert. denied*, 474 U.S. 817 (D.C. Cir. 1984); *Chappell v. GTE Products Corp.*, 803 F.2d 261 (6th Cir.), *cert. denied*, 480 U.S. 919 (1986); *Ayala v. Mayfair Molded Products Corp.*, 831 F.2d 1314 (7th Cir. 1987); *Furr v. AT&T Technologies, Inc.*, 824 F.2d 1537 (10th Cir. 1987); *Stanfield v. Answering Service, Inc.*, 867 F.2d 1290 (11th Cir. 1989).

There is still another line of similar proofs in the two cases which received dissimilar treatment by the Third Court. In both *Siegel* and the instant action, other older employees of rank and seniority similar to plaintiff's had been discharged during the same general period and replaced by markedly younger people, which, it was argued, was part of an overall youth movement set in motion at the firm. Statistical proof of a pattern of age discrimination is an accepted and valid avenue of demonstrating discriminatory conduct. *See, e.g., Hebert v. Mohawk Rubber Co.*, 872 F.2d 1104 (1st Cir. 1989); *Verbraeken v. Westinghouse Elec. Corp.*, 881 F.2d 1041 (11th Cir. 1989). The Third Circuit in *Siegel* similarly concluded that the discharge of others could indicate a pattern of age discrimination, which also could be considered by the trier of facts in association with the facts in evidence, with other inferences raised and with presumptions available to plaintiff. In the instant case, however, the fact that other professionals of similar age were terminated in favor of markedly younger men was virtually ignored.

How can two such cases, similar in every way but one, be viewed so differently by the same Court within five months of itself? Was it, as suggested by the Trial Court, because a clerical worker need not satisfy the same standard of proof, as one in middle management? And is there a basis, under statute or decisional law, which justifies such a class distinction? Is not the policy of our nation, expressed in the preamble to the ADEA statute, the same for both? Does not Petitioner, James Perry, terminated after 30 years and still without employment, and his family suffer the same from discrimination as that of the clerical worker? Why, then, should there be two standards of proof?

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Of Counsel:

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APPENDIX

BEST AVAILABLE COPY

ORDER OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT, DENYING PETITION FOR REHEARING, DATED JUNE 13, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5931

JAMES N. PERRY,

Appellant

v.

PRUDENTIAL BACHE SECURITIES, INC.

(D.C. Civil No. 88-342)

PRESENT: HIGGINBOTHAM, *Chief Judge*, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN and NYGAARD, *Circuit Judges*, and GARTH, *Senior Circuit Judge*.*

The petition for rehearing filed by appellant having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT,

_____

Circuit Judge

DATED: June 13, 1990

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* As to panel rehearing only.

JUDGMENT ORDER OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MAY 2, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5931

JAMES N. PERRY,

Appellant

v.

PRUDENTIAL BACHE SECURITIES, INC.

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 88-342)
District Judge: Honorable Maryanne Trump Barry

Argued tuesday, April 24, 1990

BEFORE: BECKER, GREENBERG and GARTH,
Circuit Judges

JUDGMENT ORDER

After consideration of the contentions raised by appellant, James N. Perry, it is

ADJUDGED AND ORDERED that the judgment of the district court dated October 30, 1989 be and the same is hereby affirmed.

Costs taxed against appellant.

By the Court,

ATTEST:

_____
Sally Mrves, Clerk

_____
Circuit Judge

DATED: MAY 2, 1990

OPINION OF DISTRICT COURT DATED OCTOBER 30, 1989

UNITED STATES DISTRICT COURT,
D. NEW JERSEY

JAMES N. PERRY,

Appellee,

— against —

PRUDENTIAL-BACHE SECURITIES, INC.,

Appellant.

Before Barry, District Judge

I. INTRODUCTION

This is an age discrimination case. Plaintiff James N. Perry (hereinafter "Perry") filed the present action against his former employer, Prudential-Bache Securities, Inc. (hereinafter "Pru-Bache"), alleging that he was unlawfully terminated in violation of the Age Discrimination In Employment Act, 29 U.S.C. §§ 621-634 (hereinafter "ADEA"). Pursuant to the ADEA, Perry seeks reinstatement to his former position, as well as damages. *See* Amended Complaint, paras. 28-39. Perry has also brought pendent claims under both New York and New Jersey law, asserting, *inter alia*, that his termination violated public policy with respect to fair employment practices. *Id.* at paras. 40-47. Perry, who was a highly compensated executive with over thirty years of experience at Pru-Bache, seeks total damages well in excess of $10,000,000.00. *See* Amended Complaint, paras. 51(1)51(5).

Present before the Court is the motion of Pru-Bache for summary judgment as to all of Perry's claims. For the reasons that follow, Pru-Bache's motion will be granted.

II. FACTS

IIa. *Background*

Perry was born on November 14, 1930, and graduated from Yale University with a bachelor's degree in 1952. After serving in the United States Army as a First Lieutenant, he undertook graduate work in business studies at New York University in 1956. *See* Plaintiff's Memorandum Of Law In Opposition To Motion For Summary Judgment (hereinafter "Perry Opposition Brief") at 5; Deposition of James N. perry, taken on December 7 and 19, 1988 (hereinafter "Perry Dep.") at 6 (deposition attached to the Affidavit of Ronald M. Green, sworn to August 17, 1989 (hereinafter "Green Aff.") at Exh. B.)). In 1956, Perry joined Halsey, Stuart & Co., Inc., a predecessor firm to Pru-Bache, as a trainee. Perry Opposition Brief at 5. In 1958, he was promoted to the Municipal Bond Department as a junior underwriter. *Id.* at 6. In 1973, at which time Perry was serving as the Manager in the Municipal Bond Department, Bache & Co. acquired Halsey, Stuart & Co. After the merger of these two firms, which were then constituted as Bache Halsey Stuart Inc., Perry was made Manager of National Underwriting. Perry continued in this position until 1981, when the Prudential Insurance Company of America acquired Bache Halsey Stuart and formed the entity which constitutes the present defendant, Prudential-Bache Securities, Inc. (Pru-Bache). Amended Complaint at paras. 9, 10; Perry Dep. at 18-19.

In his position as National Manager of Underwriting for Pru-Bache, Perry was in charge of the firm's underwriting activities involving both competitive and tax-exempt bond issues. *Id.* at 8; Deposition of Gerald P. McBride, taken on December 29, 1988 and February 16, 1989 (hereinafter "McBride Dep.") at 10-11 (deposition attached to the Green Aff. at Exh. C.). He was chiefly involved in establishing pricing systems for the bonds, that is, setting a competitive interest rate that would be both high enough to attract investors, but low enough to also be attractive to the sponsor of the bonds. Perry Dep. at 11-12.

The job of National Manager of Underwriting, while a position of considerable importance involving tens of millions of

dollars, carried with it comparatively few broad management responsibilities. As the National Manager, Perry was responsible for supervising five underwriters in New York and receiving reports from the trader underwriters located in Pru-Bache's twelve regional offices. Perry Dep. at 13-14; McBride Dep. at 11; Memorandum Of Law In Support Of Defendant's Motion For Summary Judgment (hereinafter "Pru-Bache Movant Brief") at 7.

The parties do not dispute the fact that Perry enjoyed an excellent reputation in his capacity as an underwriter. His job evaluations consistently show that he was respected throughout the bond industry and that he performed the underwriting functions of his job with great skill. Pru-Bache Movant Brief at 7; McBride Dep. at 14, 26; Indeed, one of his supervisors summarized his performance as of January, 1983, as follows: "Jim is still recognized as the premier competitive underwriter in our business. He is also one of the smartest people in the municipal industry. He has helped public finance on a number of very important presentations this year. We ranked #2 in competitive underwriting this year." Perry Opposition Brief at 9; Affidavit of William P. Ford, sworn to September 8, 1989 (hereinafter "Ford Aff.") at Exh. I.

Despite this clear recognition of Perry's skill as an underwriter, his immediate supervisor, Gerald P. McBride (hereinafter "McBride"), who was then serving as Manager of the Municipal Department, held reservations concerning Perry's ability to carry out the managerial, as opposed to the underwriting, tasks of his job. McBride Dep. at 24-26. McBride believed that Perry was a poor communicator, aloof, and did not follow matters in his office in sufficient detail. *Id.* at 27.

In March, 1985, a reorganization of Pru-Bache took place. The Municipal Department (along with the Public Finance Department) was merged into a newly created group, the Tax-Exempt Division. Pru-Bache Movant Brief at 8. McBride became the manager of this Division. As a consequence of his promotion, McBride's former job as Manager of the Municipal Department became vacant. McBride Dep. at 7. McBride's immediate

supervisor, James Glynn (hereinafter "Glynn"), who was then serving as Executive Vice President in charge of the Fixed Income Group, recommended that Perry be promoted to fill McBride's former position as Manager of the Municipal Department. McBride objected to Perry's promotion to manager of the bond department, and expressed his reservations, outlined above, directly to Glynn. McBride Dep. at 9-20. He reiterated these objections at a meeting which was held with the Chairman of the Board, George Ball (hereinafter "Ball"). McBride Dep. at 21-22. It was, nevertheless, Glynn's position that Perry deserved a chance to become "a manager" and, in March, 1985, Perry was promoted to the position that McBride had formerly held. McBride Dep. at 23; Pru-Bache Movant Brief at 9. It was this position, with its vastly greater responsibilities and managerial scope, and in which Perry earned $350,000 per year, from which he was dismissed eighteen months later, in October, 1986. It is this dismissal which he challenges before this Court as having been undertaken in bad faith and in violation of the ADEA.

During the period in which Perry served as Manager of the Municipal Department, i.e., from March, 1985, to October, 1986, several personnel changes took place in the management structure immediately above the position in which Perry served. While Perry's immediate supervisor continued to be McBride, the duties of McBride's own supervisor (Glynn) were taken over by James T. Gahan (hereinafter "Gahan") who, in May, 1985, became President of the Capital Markets Group. Deposition of James T. Gahan, taken on February 15, 1989 (hereinafter "Gahan Dep.") at 5, 8-9 (deposition attached to Green Aff. at Exh. D.). Pru-Bache Movant Brief at 10. In May of 1986, however, Gahan was promoted to President of Capital Funding, and one Leland Paton (hereinafter "Paton") took over Gahan's former position as President of Capital Markets. Gahan Dep. at 64; Pru-Bache Movant Brief at 10. At the time Perry was dismissed in October, 1986, the immediate command structure over the position he held as Manager of the Municipal Department, in ascending order, was as follows: 1) McBride (previous supervisor for two and one half years, now Director of the Tax-Exempt Division); 2) Paton (President of Capital Markets); 3) Gahan (President of Capital Funding).

IIb. *Perry's Performance As Manager of the Municipal Department*

Perry's new position as Manager of the Municipal Department involved new and greatly expanded duties. In addition to overseeing his replacement as chief underwriter, Perry was required to handle trading, retail sales development, and the firm's new research efforts in the bond area. Perry Dep. at 25. He was required, as well, to actively oversee and manage the personnel in the regional offices, whereas in his former position he had merely been required to guide the trader underwriters in the local offices. Perry Dep. at 26-27; Pru-Bache Movant Brief at 9. He, thus, moved from a position in which he was primarily engaged in underwriting and the supervision of his five key underwriters in New York (and the regional trader underwriters in the local offices) to the active supervision of all of the regional bond work, a job encompassing the supervision of over 130 employees. Perry Dep. at 42-34, 5; Pru-Bache Movant Brief at 9.

Perry's supervisors were not happy with his management of the Municipal Department. The concerns of Messrs. McBride, Paton and Gahan were grouped into four categories, each of which will be reviewed in more detail below. As an overview, however these four areas can be summarized as follows. First, his supervisors felt that Perry's day to day management of the Municipal Department was far too loose in that he failed to provide adequate supervision and guidance to his subordinates. They also complained that he failed to properly supervise expense accounts, and failed to visit the regional offices with any frequency. Pru-Bache Movant Brief at 12-13. Second, his supervisors were frustrated that he resisted following their request that he "mark-to-market" the firm's own bond holdings in a manner describing high and low periods of profitability. Pru-Bache Movant Brief at 14-15. Third, his supervisors were dissatisfied with the level of profitability of the bond section. Pru-Bache Movant Brief at 15-17. Finally, his supervisors were concerned about the relationship between Gahan and Perry, which had become so strained that these two top managers were barely on speaking terms at the time of Perry's discharge. Pru-Bache Movant Brief at 17-20.

As to the first concern regarding Perry's management of the day to day affairs of the Municipal Department, several events stand out as being relevant to the present motion. While Perry has described his management style as being "open" and one in which he avoided trying to give his subordinates "too much over-supervision", it is clear that his supervisors wanted a tougher "hand's on" approach. *See* Perry Dep. at 138, *compare* Gahan Dep. at 65; McBride Dep. at 47, 85-86, 138-139. The consequences of Perry's loose management style became apparent to McBride when he began to receive numerous complaints from Perry's subordinates in the field that Perry did not provide leadership or direction to the salesmen and underwriters from the regional offices. McBride Dep. at 35, 150-151. In addition the immediate personnel that Perry supervised in New York, that is, the Head Trader, the Manager of the Regional Municipal Department, and the National Manager of Municipal Underwriting, also brought similar complaints to McBride. McBride Dep. at 34-39, 85-87, 149-152.

In addition to these general leadership complaints, McBride became dissatisfied with Perry's handling of the department's more mundane tasks. McBride's criticisms included: 1) allowing the desks in the office to be undermanned through inadequate supervision of personnel scheduling; McBride dep. at 147, 162; Green Aff. at Exh. A, Documents 000487-00490;[1] 2) improper supervision of employee expense accounts, including one

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[1] Documents 000487-000490 attached as Exhibit A to the Green Affidavit are particularly telling. These documents consist of brief notes made by McBride during the course of Perry's employment summarizing points of criticism and other general topics regarding Perry's performance which McBride wished to discuss with Perry. McBride Dep. at 136, 140, 149, 162. In addition to focusing on lack of supervision of the desks in the office, they contain notes on other problems discussed above including, for example, the name of an employee in the Underwriting Department who left the company because he felt he was not receiving adequate guidance from Perry.

Most critically, nowhere in Perry's submissions does he specifically refute these notes or, indeed, any of the broader assertions made throughout the testimony elicited at the depositions. While Perry asserts that most if not all of

(*Footnote continued*)

instance in which a Pru-Bache employee was allowed to use company funds to purchase Christmas gifts for other employees; McBride dep. at 166; and 3) Perry's departure for a vacation without informing his secretary or McBride. McBride dep. at 142-143; Green Aff. at Exh. A, Document 000487.

As to the second concern regarding Perry's dispute with top management about the most efficacious way to "mark-to-market"[2] the firm's bond holdings, McBride and particularly Gahan were dissatisfied with Perry's handling of this aspect of his job. Indeed, it was on this point perhaps more than any other that Perry's performance was criticized. Gahan had specifically requested that the bonds be marked up as well as down in order to gauge both profits and losses. Pru-Bache Movant Brief at 14; Gahan Dep. at 14-16. Perry did not feel that marking up was required, and resisted his supervisors' instructions on this point. Both McBride and Gahan expressed their wishes to Perry in a

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McBride's concerns were never directly communicated to him, this fact, if it be fact, has no relevance to the present motion. *See, e.g., Pierce v. New Process Co.*, 580 F.Supp. 1543, 1545 (W.D. Pa. 1984), *aff'd. mem.*, 749 F.2d 27 (3rd Cir. 1984) ("[T]he Company is under no obligation to warn plaintiff of complaints regarding his performance and, if anything, the effect of such evidence is equivocal, perhaps indicating that plaintiff was receiving the benefit of the doubt"). *Id.*

In addition, Perry asserts that most if not all of Pru-Bache's evidence should be given little weight, in that the bulk of this evidence was compiled only after Pru-Bache learned of Perry's intention to sue upon his claim for age discrimination. *See* Perry opposition Brief at 18. While I agree that self-serving, post facto explanations must be approached with caution, *see Healy v. New York Life Ins. Co.*, 860 F.2d 1209, 1215 (3rd Cir. 1988), I have found nothing in Perry's affidavits or briefs – other than the bald assertion of "post-hoc justification" – to demonstrate that Pru-Bache's assertions were spurious or recently constructed. Moreover, were plaintiff's logic taken to its logical extreme, a defendant employer would be precluded from ever proffering evidence in the regular course of discovery which could not be labeled as "host hoc" justifications.

[2] Pru-Bache describes the "mark-to-market" process as the means by which a securities firm keeps track of the value of the bonds it holds for its own account. The degree of specificity with which a securities firm can track the high and low value of the bonds it holds determines the precision of its calculation of profit and loss on those securities. *See* Pru-Bache Movant Brief at 14.

series of inter-office memoranda and through office meetings which were held on this subject. Gahan Dep. at 16-17; McBride Dep. at 170-174; Green Aff., Documents 000499-000502. As McBride summarized the situation regarding the disagreement between Perry and the firm on this point:

> At that time, Mr. Gahan was constantly on my back to get Mr. Perry to follow the directions, whether he liked it or didn't like it. These are the rules and he had to follow those rules.
>
> It got to the point where there was constant calling to me by Mr. Gahan about Mr. Perry's resistance to doing what we told him to do. . . . It got so bad that Mr. Gahan almost refused to speak to Mr. Perry . . .

McBride Dep. at 177.

As to the third area of concern, it was clear that Perry's supervisors believed that Perry was not generating the level of profits which they believed could have resulted from the very favorable market conditions which existed during the months in which he served as Manager of the Municipal Department. While the parties dispute the role that Perry played in generating the substantial profits that the firm in fact enjoyed during that period of time,[3] it is clear that top management believed that any "warm body" could have generated the same profits. McBride Dep. at 90, 167; Gahan Dep. at 37-42, 53-56, 65-66; Paton Dep. at 40-42; Green Aff. at Exh. A, documents 000497-000498; *cf.* Perry Opposition Brief at 10. Indeed, after Perry had been in his new job for five months, and Gahan had reviewed his performance in handling the firm's bond positions,

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[3] In his opposition papers, Perry correctly points out that the gross revenues generated by the Municipal Department during the 1984 calendar year were approximately $94,000,000.00, a figure which represents an almost 50% increase over the previous year's figures. Perry Opposition Brief at 10. Regardless of how impressive this figure may appear to be, the real factual inquiry relevant to this appeal is not whether the Municipal Department experienced gain or even loss, but rather, whether the management at Pru-Bache were satisfied with Perry's performance of his role.

Gahan recommended to McBride that Perry's employment be terminated. Gahan Dep. at 37-38.

Finally, as to the fourth area of general concern, and particularly in light of the events described above, it is clear that Perry's relationship with both McBride and Gahan had to deteriorated [sic] to a rather low level. It was Perry's belief that McBride circumvented his authority in the management of his department, Perry Dep. at 101, ultimately describing McBride as being "pigheaded". *Id.* at 109; Pru-Bache Movant Brief at 19.

After Paton become [sic] the President of Capital Markets, he, too, determined that it would be in the best interests of the firm to terminate Perry's employment. Paton dep. at 61-65, 71-73. Thus, by mid-1986, Paton, Gahan and McBride had determined to release Perry from employment. They also agreed to give Perry a severance package which would continue his salary through October of 1987 and pay him his regular bonus for 1986. McBride Dep. at 97-98.

IIc. *The Termination Decision*

In the course of determining Perry's severance package, McBride drew up a very short memo to himself, which he apparently referred to in the meeting in which Perry was told of his discharge. *See* Ford Aff. at Exh. N. In addition to indicating point by point the various items that McBride wanted to discuss at the meeting (continuation of salary and bonus, date for collecting personal belongings, etc.), the memo notes Perry's birthdate as well as a calculation of how old he was at the time of the meeting (55 years of age) in the top right hand corner. Moreover, under Arabic number "4" in the column entitled "PBS will provide", the memo states (in addition to the salary and bonus described above which were marked next to numbers "1" and "2") in McBride's handwriting: "4) pension will be funded to age 65 level". *Id*; *See* McBride Dep. at 97 (affiant's oral recapitulation of the contents of the note).

Perry asserts that the age calculation in the upper right hand corner of the document constitutes tangible proof that age was a key consideration in the thoughts of the Pru-Bache executives

who discharged him. *See* Perry Opposition Brief at 12. At his deposition, McBride did not dispute that he placed Perry's age in the upper corner of the document, or that he did so to have in mind Perry's age at the time he advised him of the discharge. McBride states, however, that he made the notation as a means of calculating the number of years required were the company to fund Perry's pension as if he had reached age 65 and that the calculation was merely part of the item to be discussed under item "4", i.e., the possibility of funding Perry's pension until he should reach the standard retirement age. McBride Dep. at 97-98.[4] The decision to terminate Perry had already been made. McBride informed Perry of the company's decision to terminate him, and stated that it was time for "new blood" or "new leadership" at Pru-Bache. Perry Dep. at 174.

Perry asserts that he was surprised to hear that he was being terminated, and that his superiors were disappointed in his management of the Municipal Department. After his discharge, Perry wrote a letter to Chairman Ball, asking for a more detailed explanation of the reasons for his termination. Perry Opposition Brief at 14-18. Ball's response was rather general, and stated that often a company simply needs change. *See* Ford Aff. at Exh. P. Perry sent a second letter to Ball and raised allegations of age discrimination. *Id.* at Exh. Q. He did not receive a response. Perry Opposition Brief at 17.

Perry was replaced by Thomas Monti (hereinafter "Monti"), who was then age 41. Monti joined the company in October, 1986, and was discharged in August, 1988, supposedly because

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[4] Perry asserts that McBride's deposition testimony on this point is unworthy of belief. Perry notes that McBride initially testified that he could not recall why he had placed Perry's age in the corner of the document, and that McBride only remembered his "reason" for doing so after a break in the deposition and after a conference with his counsel. *See* Perry Opposition Brief at 12; McBride Dep. at 67, 97-98; Ford Aff. at Exh. X. Pru-Bache's attorneys have described this remark as a "desperate and outrageous accusation: which implies that Pru-Bache attorneys have committed a fraud on the Court and a "regrettable tactic" undertaken to make up for a "woeful lack of evidentiary support" for plaintiff's case. *See* Defendant's Reply Memorandum Of Law In support Of Its Motion For Summary Judgment (hereinafter "Pru-Bache Reply Brief") at 20.

of a personality conflict which developed between himself and McBride. Deposition of Thomas J. Monti, taken December 22, 1988 (hereinafter "Monti Dep.") at 48-49 (deposition attached to the Green Aff. at Exh. F.)). McBride subsequently took over the job of Manager of the Municipal Department, and no new employee has been hired to fill the position. Affidavit of Gerald P. McBride, sworn to August 16, 1989 (hereinafter "McBride Aff.") at para. 3.

III. DISCUSSION

A court may only grant a motion for summary judgment if the pleadings, depositions, affidavits, and other elements of the record show that there is no genuine issue as to any material fact and that the moving party is entitled to judgement as a matter of law. Fed.R.Civ.P. 56(c). *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3rd Cir. 1976) *cert. denied*, 429 U.S. 1038, 97 S.Ct. 732, 50 L.Ed.2d 748 (1977). The burden of demonstrating the absence of a dispute as to material facts remains with the party which moves for summary judgment, a burden which will be met by showing that the evidentiary material in the record, if reduced to admissible evidence, would be insufficient to carry the non-movant's burden of proof at trial. *Celotex*, 477 U.S. at 323, 333, 106 S.Ct. at 2552, 2558.

When a plaintiff brings a cause of action under the ADEA, he or she bears the ultimate burden of proving that age was a determinative factor in the defendant employer's decision. *White v. Westinghouse Electric Co.*, 862 F.2d 56, 59 (3rd Cir. 1988); *Anastasio v. Schering Corp.*, 838 F.2d 701, 705 (3rd Cir. 1988); *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1395 (3rd Cir. 1984), *cert. denied*, 469 U.S. 1087, 105 S.Ct. 592, 83 L.Ed.2d 702 (1984). the plaintiff need not prove that age was the employer's sole or exclusive consideration, but must prove that age "made a difference" in the termination decision. *Duffy*, 738 F.2d at 1395 (*quoting Smithers v. Bailar*, 629 F.2d 892, 898 [3rd Cir. 1980]).

A plaintiff may meet the burden of proving that age made a difference in the decision to terminate through either direct

or indirect evidence. If direct evidence of discrimination exists, the case proceeds as any other civil case, and the plaintiff must proceed with the usual indicia of proof. *Gavalik v. Continental Can Co.*, 812 F.2d 834, 853-854 (3rd Cir. 1987), *cert. denied*, 484 U.S. 979, 108 S.Ct. 495, 98 L.Ed.2d 492 (1987).

I shall first address Perry's claim that direct evidence exists to support his allegations of age discrimination. First, Perry asserts that on occasion he was the object of "joking" remarks concerning his age. As Perry testified in his deposition, an example of this might include a remark such as "How old do you say this guy is?" or "When does this guy say he is going to retire?" *See* Perry Dep. at 49; Ford Aff. at Exh. X. While these remarks were delivered "in almost a jocular way", Perry did not find them amusing and felt that they were in bad taste. *Id.* While I agree with both observations, I cannot agree that the remarks constitute direct evidence of age discrimination. *See* Note 5, *infra*.

Second, Perry also has produced deposition testimony of a former Pru-Bache executive, Richard Poirier (hereinafter "Poirier"), in which Poirier claims to have heard Perry's supervisor, McBride, making one or, perhaps, two derogatory remarks in which Perry's age was invoked. Poirier's testimony, which is both equivocal and vague, concludes that, after Perry forgot to turn in a bid on a bond issue, i.e., "one isolated incident", McBride, who was angry, referred to Perry as a "stupid old bastard" (although Poirier was uncertain of the exact quote) who was "burned out and forgetful". Ford Aff. at Exh. X2.

It must be remembered that "Congress made plain that the age statute was not meant to prohibit employment decisions based on factors that sometimes accompany advancing age, such as declining health or diminished vigor and competence". *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1016 (1st Cir. 1979). When Poirier's deposition testimony is reviewed in its entirety, and not excerpted as it is in Perry's brief, it is quite clear that McBride's one remark was made in utter exasperation and in the context of McBride's dissatisfaction with Perry's failure to act vigorously and competently in the execution of his duties. Stated somewhat differently, this remark speaks not in any significant fashion to

Perry's age but, rather, to his adequacy as an executive and his complete foul up on an important matter. *See Barnes v. Southwest Forest Indus., Inc.*, 814 F.2d 607, 610611 (11th Cir. 1987) (assertion that old employee could not pass a physical exam not considered to be direct evidence of age discrimination); *Young v. General Foods Corp.*, 840 F.2d 825, 829 (11th Cir. 1988) (Manager's comment that employee "moved in slow motion: and was the same age as manager's father considered to be merely descriptive and not discriminatory)."

Moreover, I have grave doubts that McBride's remark as recounted by Poirier can be said to constitute *direct* evidence within the context of an age discrimination case. McBride's remarks do not state that Perry was to be fired because of his age and any such conclusion must be *inferred* from the description of Perry as being "old". *See Young*, 840 F.2d 829; *see further, Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1558 n. 13 (11th Cir. 1988); *Williams v. General Motors Corp.*, 656 F.2d 120, 130 (5th Cir. Unit B 1981), *cert. denied*, 455 U.S. 943, 102 S.Ct. 1439, 71 L.Ed.2d 655 (1982).

In turning now to Perry's assertion that indirect evidence exists to support his claim of age discrimination, I note that it is often the case that no direct proof of discrimination will exist, and that the employer's motives will have been masked behind the facade of conducting usual business activities. In such a situation, the law permits a plaintiff to prove discrimination through the indirect framework of proof first developed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). In this three step process, the plaintiff must first make out a prima facie case of age discrimination. If the plaintiff succeeds in setting forth a prima facie case, the burden then shifts to the employer to articulate legitimate, non-discriminatory reasons for the employee's dismissal. Finally, in the event that the employer meets its burden of producing nondiscriminatory reasons for the discharge, the burden shifts back to the employee to prove by a preponderance of the evidence that the legitimate reasons offered by the employer were not true reasons for the discharge, but were rather a pretext given to shield a discriminatory motive. *See further, Texas Department of Community*

Affairs v. Burdine, 450 U.S. 248, 252-253, 101 S.Ct. 1089, 1093-1094, 67 L.Ed.2d 207 (1981).

While the prima facie case will vary depending upon the specific facts presented in each employment situation, *McDonnell*, 411 U.S. at 802 n.13, 93 S.Ct. at 1824 n. 13, I find that in order to make out a prima facie case here, Perry must show that 1) he was a member of the class of persons protected by the ADEA (*i.e.*, over the age of forty); 2) he was qualified for the position which he held; 3) he was discharged from that position; and 4) another employee of a sufficiently younger age was hired as a replacement so as to create an inference of age discrimination. *See Healy*, 860 F.2d at 1214.

In examining Perry's assertions within the context of the *McDonnell* framework of indirect proof, I find that Perry has failed to establish the prima facie case necessary to create an inference that discrimination lay behind his discharge. It is clear that Perry meets three of the four criteria of the prima facie case: he was fifty-five years old at the time Pru-Bache decided to terminate his employment, and another employee of sufficiently younger age took his place. Perry's case falters, however, in demonstrating the remaining critrion, that is, that he was qualified for the position which he held. As the Third Circuit has noted, a claim for age discrimination will not lie against an employer for taking action which results in the termination of an employee when it is clear that, although an employee was qualified for the technical aspects of his job, he was not qualified for the managerial aspects of his job. *Spangle v. Valley Forge Sewer Authority*, 839 F.2d 171, 173 (3rd Cir. 1988) (prima facie case not established where employee fails to supply evidence to support a finding that he was performing the managerial aspects of his job well, although there was no question that he performed the technical aspects of his job in a satisfactory manner).

I find the reasoning in *Spangle* to be dispositive here. While there can be no doubt that Perry performed the technical/financial work as National Manager of Underwriting with great skill, acumen in this area was only a part of the new position

he assumed when he became Manager of the Municipal Department in 1985. While Perry's opposition papers are filled with evidence of the high calibre [sic] of his work as an underwriter, nowhere has he produced evidence to support a finding that he performed his supervisory obligations in a manner that was satisfactory to his employer.

Even assuming that Perry was qualified for the position which he held, and, thus, that a prima facie case has been made out, there is simply insufficient evidence to show that the reasons proffered by Pru-Bache for the termination of Perry's employment were a pretext for discrimination. In this context, as has been noted by several courts in our Circuit, a plaintiff must do more than just show that he was qualified for the position. He must also introduce evidence that casts doubt on his employer's contention that there was a legitimate business justification for letting him go. *See Healy*, 860 F.2d at 1212; *Turner v. Schering-Plough Corp.*, 705 F.Supp. 1048, 1051 (D.N.J. 1989).

Perry believes that such doubt exists and points to the age notations on the McBride memo utilized during the meeting at which Perry was terminated, as well as the fact that he received a favorable "9" rating on an evaluation form in the year in which he was terminated. I find this evidence unpersuasive.

Addressing the matter of the 1986 evaluation form first, it is clear that this evaluation is simply not indicative of the manner in which Perry was viewed at or about the time of his discharge. The form clearly indicates that the "9" rating was a rating given to him more than a year earlier in his previous position. Any further evaluation by means of salary adjustment has been marked "defer". *See* Ford Aff. Exh. L. Even were the single digit "9" to be indicative of excellent performance prior to February, 1986, when the evaluation was prepared, seemingly consistent with Perry's promotion to Manager of the Municipal Department, "promotion from a lower level job does not mean that problems do not exist which could affect performance in a more demanding job". *Turner*, 705 F.Supp. at 1051 (*noting Healy*, 860 F.2d at 1215.

As to McBride's notes regarding Perry's age, I find that these computations represent exactly what they appear to be, *i.e.*,

calculations regarding the possibility of funding Perry's pension. To assert that an employer is incapable of ever mentioning or noting an employee's age in a discharge situation would be to work the absurd result that an employer could not discuss severance packages and pension calculations with a departing employee or with other members of the firm. The notation as to date of birth and age in the upper corner of the document were clearly part and parcel of the retirement package which was directly communicated to Perry at the meeting. There was no secret as to the fact that the company was considering bridging Perry's pension, or that the firm would obviously need to know Perry's age in order to do so.

Finally, Perry argues that the assertions of Pru-Bache executives as to their beliefs regarding the quality of his work is a subjective matter which presents issues of credibility and is, thus, peculiarly unsuited for disposition on summary judgment. *See Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3rd Cir. 1987); *Sorba v. Pennsylvania Drilling Co., Inc.*, 821 F.2d 200 (3rd Cir. 1987); Perry opposition Brief at 35. As Perry correctly points out, *Chipollini* emphasized that the issue of defendant's intent at the time of discharge is inherently a factual question, and that summary judgment should not be granted where the plaintiff can introduce evidence calling into question the defendant's motive regarding the discharge. *Chipollini*, 814 F.2d at 901.

That is simply not the case here, for Perry has not presented this Court with anything which would call into question the credibility of Pru-Bache executives or tend to demonstrate that Pru-Bache acted with an impermissible motive. Obviously, without counter-affidavits or other evidence that there is reason to disbelieve that employer's "legitimate" reasons for discharge, a plaintiff will be deemed to have failed to set forth an issue of fact, and thus failed to have demonstrated that the proffered reason was a pretext for discrimination. *See Healy*, 860 F.2d at 1219; *Turner*, 705 F.Supp. at 1051.[5]

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[5] While Perry points to both the casual and "almost jocular" remarks concerning his age and the fact that McBride stated that the firm was looking for

(*Footnote continued*)

I turn now to the state law claims brought under New York and New Jersey law. As a preliminary matter, I note that choice of law principles dictate that, given the New York employment at issue here, New York and not New Jersey law should be applied in this case.[6] Accordingly, Perry's New Jersey claims will be dismissed, as they have been inappropriately raised.

"new blood" or "new leadership", I find neither of these of sufficient evidentiary value to discredit the legitimate motives put forth by Pru-Bache as reasons for the discharge. As to the remarks concerning Perry's age, Pru-Bache correctly points out that off-hand comments of a joking nature are rarely considered to create sufficient doubt so as to raise an inference of intentional discrimination, and cannot be so viewed here. *See, e.g., Mantione v. Ted Bates Advertising*, 38 Fair Empl. Prac. Cas. (BNA) 1457, 1462, 1985 WL 2516 (S.D.N.Y. 1985) (Description of employee as "Santa" in retirement comment insufficient to warrant finding of intent to discriminate); Pru-Bache Movant Brief at 49-50. I agree.

As to McBride's comment that the firm need "new blood", I take this to mean nothing more than that Pru-Bache wanted to *change* employees, whether they be younger or older. Indeed, as one circuit has noted, even if McBride has used the more suggestive phrase "younger blood" instead of "new blood" or "new leadership", this would be insufficient to preclude the granting of summary judgment. *See Gagne v. Northwestern Natl. Inc. Co.*, 881 F.2d 309, 314 (6th Cir. 1989).

Finally, it is important to point out that Perry held one of the highest and most vital positions within Pru-Bache. His decisions affected millions of dollars worth of the firm's capital and the overall profitability of the company's bond positions were directly affected by his management style and approach to the job. Under such circumstances, it is eminently appropriate that the subjective estimation of his performance should be treated with deference. *See Pirone v. Home Ins. Co.*, 559 F.Supp. 306 (S.D.N.Y. 1983). Pru-Bache has noted this in its brief, and indeed has cited *Pirone* in relevant part: "[Plaintiff] was at the highest level of power and responsibility at [the insurance company which employed him], and the subjective evaluation of his chief that he should be let go must be accorded great respect". *Id.* at 310-311. On this basis alone, the undisputed friction which existed between Perry and Gahan — such that they could barely speak to one another — might weel have constituted grounds for termination.

[6] Under the rule established in *Klaxon Co. v. Stentor Electric*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941), a federal court applying state law must

(*Footnote continued*)

In Count Five of his Amended Complaint, Perry asserts that he was unlawfully discharged from his employment in violation of N.Y. Executive Law §§ 296 (McKinney 1982), which prohibits an employer from discriminating against its employees based upon age. I note, however, that a detailed inquiry into New York law is not required, inasmuch as New York follows the framework established for resolving federal claims brought under the ADEA, which I have already reviewed. *See Miller Brewing Co. v. State Div. of Human Rights*, 66 N.Y.2d 937, 498 N.Y.S.2d 776, 489 N.E.2d 745 (1985). Accordingly, for the reasons set forth above in connection with Perry's ADEA claims, I shall also grant summary judgment for Pru-Bache on Perry's New York claims.

Defendant Pru-Bache's Motion for Summary Judgement will be granted. An appropriate order will issue.

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utilize the choice of law analysis of the state in which it is located. *See also Dent v. Cunningham*, 786 F.2d 173, 176 (3rd Cir. 1986). New Jersey utilizes a modern conflicts approach, which seeks to have the forum with the most significant contacts to the dispute apply its law in determining the rights and liabilities of the parties. *See Rose v. Port of N.Y. Auth.*, 61 N.J. 129, 140, 293, A.2d 371 (1972). On the facts presented, it is clear that New Jersey would apply New York law to determine the resolution of this dispute. *See Shamley v. ITT Corp.*, No. A-4728-87T1 (N.J. Super. Ct. App. Div., Dec. 27, 1988) (*held*: New York law applies to a claim brought by a New Jersey resident against his New York employer; public policy dictates that employers in New York should not be subject to differing rules of law, based upon the varying location of employees' domiciles). *See further Shamley v. ITT Corp.*, 869 F.2d 167, 171 (2d Cir. 1989).

(2)

No. 90-432

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAMES N. PERRY,

Petitioner,

v.

PRUDENTIAL-BACHE SECURITIES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether summary judgment properly was awarded to respondent on petitioner's claim under the Age Discrimination in Employment Act, as amended, 29 U.S.C. §§ 621 *et seq.* ("ADEA"), where the evidence established indisputably that petitioner's employment was terminated because of his superiors' dissatisfaction with his job performance and that age played no part in the decision?

PARTIES BELOW AND PARENT COMPANIES

The names of the parties below are properly identified in the Petition. The Prudential Insurance Company of America is the parent company of respondent Prudential-Bache Securities, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-432

JAMES N. PERRY,

Petitioner,

v.

PRUDENTIAL-BACHE SECURITIES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Prudential-Bache Securities, Inc. ("Pru-Bache") respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The judgment order (without opinion) of the United States Court of Appeals for the Third Circuit is published at 904 F.2d 696 and is set forth in the Appendix to the Petition ("Pet. App.") at 2a. The opinion of the United States District Court for the District of New Jersey is reported at 738 F. Supp. 843 and is contained in Pet. App. at 3a-20a.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on May 2, 1990. A petition for rehearing was denied by order of that court dated June 13, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

In addition to the provisions set forth in the Petition at 2-3, the ADEA, as amended, 29 U.S.C. § 623(f), provides as follows:

> It shall not be unlawful for an employer, employment agency, or labor organization—
>
> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or
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> (3) to discharge or otherwise discipline an individual for good cause.

STATEMENT OF THE CASE

Petitioner seeks review of a judgment order of the United States Court of Appeals for the Third Circuit affirming without opinion a decision awarding summary judgment in favor of Pru-Bache on petitioner's termination claim under the ADEA.

A. Factual Background

After having been employed by Pru-Bache (or its predecessors) for a number of years, Perry served as National Manager of Underwriting with Pru-Bache from 1982 to March 1985. In that position, Perry did not have broad management or supervisory responsibilities.

Notwithstanding previously expressed concerns about Perry's managerial capabilities, in March 1985, at the age of 54, Perry was promoted to the position of Manager of the Municipal Department. Perry's promotion to Manager of the Municipal Department entailed a substantial change and increase in his job responsibilities, including far broader responsibilities that required Perry to exercise significant supervisory and managerial responsibilities.

Throughout his eighteen-month tenure as Manager of the Municipal Department from March 1985 to October 1986, during which time he earned $350,000 per year, Perry's job performance was a source of serious dissatisfaction to his superiors and to many of his subordinates. This dissatisfaction fell into four broad, though interrelated, categories. First, Perry's superiors believed that he failed to manage his department properly, particularly with regard to providing leadership and direction to his subordinates. Second, Perry's superiors believed that he failed to have the Municipal Department's bond inventory "marked-to-market" adequately, that is, the value of the firm's bond inventory was not being properly and completely recorded on a daily basis as required. Third, Perry's superiors were consistently dis-

satisfied with the level of profitability obtained by the Municipal Department. Fourth, and perhaps most significantly, the relationship between Perry and his superiors became strained to the point that one of his superiors (who was 53 years of age at the time of Perry's termination) virtually refused to speak to Perry, making it impossible to work effectively. Perry failed to present any evidence that called into question his superiors' individual and collective dissatisfaction with his performance in the position from which he was terminated.

Due to his superiors' collective dissatisfaction with his performance in the position of Manager of the Municipal Department, Pru-Bache terminated Perry's employment in October 1986.

B. Procedural Background

In January 1988, Perry filed an action in the United States District Court for the District of New Jersey alleging ADEA violations and pendent age discrimination claims under New Jersey law. Following extensive discovery and after oral argument, the district court on October 30, 1989 granted Pru-Bache's motion for summary judgment. Pet. App. at 3a-20a.

Perry appealed the award of summary judgment in favor of Pru-Bache to the Third Circuit. By a judgment order dated May 2, 1990, the court of appeals affirmed the district court without opinion. Pet. App. at 2a. The court of appeals denied Perry's request for rehearing by order dated June 13, 1990.

REASONS FOR DENYING THE WRIT OF CERTIORARI

Perry seeks to have this Court review the affirmance by the court of appeals *without opinion* of the award of summary judgment in favor of Pru-Bache. While he expresses disagreement with the result in that judgment order, he has not demonstrated that the judgment order of the court of appeals is in conflict with a decision of another United States court of appeals nor has he shown that the judgment order so far departed from the accepted and usual course of judicial proceedings to call for the exercise of this Court's power of supervision. *See* Sup. Ct. R. 10.1(a). Rather, the record in this case demonstrates that the courts below acted entirely properly and, accordingly, it is respectfully requested that the writ be denied.

The decisions below in this case are wholly in accord with this Court's pronouncements on the propriety of and standards relating to summary judgment under Rule 56 of the Federal Rules of Civil Procedure. For example, this Court instructed in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original), that "[b]y its very terms, [Rule 56] provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact."

Further, this Court has observed that no *genuine issue of material fact* exists where the non-moving party fails to make a sufficient showing as to the existence of an essential element of its case on which it will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Moreover, where the evidence in opposition to the motion is "merely colorable" or "not significantly probative," *Anderson*, 477 U.S. at 249-50, summary judgment may be granted. The Court in *Celotex*, 477 U.S. at 327 (citation omitted), also stated that:

> [s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action."

Of particular importance to the instant case was the Supreme Court's observation in *Celotex*, 477 U.S. at 327, that:

> Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

When, as here, a motion for summary judgment is properly supported, the nonmoving party cannot rest on mere allegations but is required to set forth specific facts demonstrating that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Liberty Lobby*, 477 U.S. at 248-49. Thus, mere allegations, unsupported by evidence, cannot defeat a properly supported motion for summary judgment. *See, e.g., Liberty Lobby*, 477 U.S. at 247-48. Moreover, contrary to Perry's apparent contention, summary judgment is not inappropriate simply because issues of intent may be involved. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 597-98 (1986).

In the instant case, Perry ignored these clearly established principles under Rule 56 and pertinent decisions of this Court and failed to offer evidence on the critical issues on which he would bear the burden of proof at trial. For example, Perry failed to produce evidence that he met the legitimate expectations of his employer in the new position he held at the time of his termination. As the district court properly observed, "[w]hile Perry's opposition papers are filled with evidence of the high calibre of his work as an underwriter, nowhere has he produced evidence to support a finding that he performed

his supervisory obligations in a manner that was satisfactory to his employer." Pet. App. at 17a. Absent this required showing, Perry failed to establish even a prima facie case of discrimination relating to his termination. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Spangle v. Valley Forge Sewer Auth.*, 839 F.2d 171, 173-74 (3d Cir. 1988) (no prima facie case established where employee failed to adduce any evidence to support a finding that he was performing satisfactorily his supervisory and managerial duties, although he could perform the technical aspects of the job).[1]

Even assuming arguendo, as the district court did, that Perry somehow established a prima facie case, the courts below properly determined that Perry had not produced evidence sufficient to create triable issues of fact on the question of whether the reasons proffered by Pru-Bache for the termination of Perry's employment were a "pretext" for unlawful discrimination. *See* Pet. App. at 17a-18a; *Burdine*, 450 U.S. at 256. After thoroughly considering the "evidence" of discrimination proffered by Perry, the district court properly concluded that:

> Perry has not presented this Court with anything which would call into question the credibility of Pru-Bache executives or tend to demonstrate that Pru-Bache acted with an impermissible motive. Obviously, without counter-affidavits or other evidence that there is reason to disbelieve [the] employer's "legitimate" reasons for discharge, a plaintiff will be deemed to have failed to set forth an issue of fact, and thus failed to have demonstrated that the proffered reason was a pretext for discrimination.

Pet. App. at 18a (citations omitted).

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[1] Perry's contentions that he was qualified because of his performance in a previous, less-demanding job with fewer supervisory responsibilities provided no evidence that he was meeting his supervisor's expectations in the new job.

Thus, it is clear that the courts below assiduously followed the law as set forth by this Court with regard to the award of summary judgment in civil cases generally and in the context of an equal employment dispute. Accordingly, Perry has failed to demonstrate any reason why this Court should exercise its power of supervision to review this case.

Because he otherwise is unable to show any reason why review of the case should be granted, Perry argues that this Court should grant his petition because the judgment order entered *without opinion* by the Third Circuit purportedly is "contrary" to a previously decided case in the same circuit. As discussed below, there is in fact no inconsistency between the two decisions. In any event, any purported inconsistency between two decisions from the same circuit does not provide a basis for this Court to exercise its discretion to review the instant case.

Perry contends that the judgment order without opinion of the Third Circuit in the instant case somehow is "contrary" to the decision of the Third Circuit in *Siegel v. Alpha Wire Corp.*, 894 F.2d 50 (3d Cir.), *cert. denied*, 110 S. Ct. 2588 (1990). Because the instant case was decided by the Third Circuit by a judgment order *without opinion*, Perry admittedly can only attempt to surmise why the two cases were decided as they were.[2] An examination of the two cases, however, demonstrates that any difference in results turned not on different burdens of proof, but rather on Perry's failure to produce evidence on critical aspects of his case on which he would bear the burden of proof at trial.

Unlike in *Siegel*, Perry had not received favorable performance evaluations from any of his three superiors in his new position as Manager of the Municipal Depart-

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[2] Perry states in his Petition that "a comparison between the instant decision and the other one best demonstrates how there *seems to be* two different burdens of proofs [sic] in age discrimination cases within the Third Circuit, depending, *it seems*, on the sophistication of the employee." Petition at 6 (emphasis added).

ment. Rather, all of his superiors, and others, had expressed serious concerns about Perry's performance in his new position. Perry chooses to ignore the critical distinction that he simply failed to produce evidence either that he was meeting the legitimate expectations of his superiors in his new position or on the issue of whether the reasons for his termination by his superiors were a pretext for unlawful age discrimination. Absent this critical evidence, the district court had no choice but to enter summary judgment in favor of Pru-Bache.[3]

In sum, any difference between the instant case and *Siegel* resulted not from a greater burden of proof applied in this case, but rather from a lack of evidence produced by Perry to raise a genuine dispute as to whether his age was the reason for his discharge.[4]

In this case, Perry elected to rest on his pleadings, on his conclusory allegations of discrimination, and on his contention that he could disprove Pru-Bache's legitimate, nondiscriminatory reasons for his discharge if allowed to

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[3] Moreover, the district court in this case properly and thoroughly considered and rejected Perry's other purported "evidence" of discrimination, including, inter alia, purported age-related remarks and notations. *See* Pet. App. at 17a-19a. The district court correctly observed that any purported age-related remarks either were "jocular" in nature or were not in fact age-related at all. *Id.* at 18a-19a n.5; *see also Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309, 314 (6th Cir. 1989); *Mantione v. Ted Bates Advertising*, 38 Fair Empl. Prac. Cas. (BNA) 1457, 1462 (S.D.N.Y. 1985). The district court also correctly determined that a reference to Perry's age on a memorandum prepared after the decision to terminate him had been made related to the possibility of funding Perry's pension and did not provide evidence that Perry's termination was because of his age. Pet. App. at 17a-18a.

[4] Even if the results in the two Third Circuit cases were in fact "contrary," as Perry incorrectly contends, that "contrary" result is one that properly should be rectified by the Third Circuit and not by this Court. By denying Perry's request for rehearing, where he raised the same contention, the Third Circuit apparently rejected Perry's argument that its decision in the instant case was "contrary" to its decision in *Siegel*.

do so at trial. He produced no credible evidence, however, that demonstrated that his age was the reason for his termination. Such speculative and conclusory assertions of discrimination without evidentiary support simply are not sufficient to defeat a properly supported motion for summary judgment, *see Liberty Lobby*, 477 U.S. at 247-48; *Celotex*, 477 U.S. at 324-25; *Matsushita*, 475 U.S. at 586-87; *Healy v. New York Life Ins. Co.*, 860 F.2d 1209, 1216 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 2449 (1989), and the courts below properly determined that summary judgment was appropriate in favor of Pru-Bache.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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